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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,)	NO. 1:21-CR-2009-SAB-2
Plaintiff,)	
v.)	UNITED STATES' RESPONSE TO
ROMAN BERUMEN PEREZ,)	DEFENDANT ROMAN BERUMEN
Defendant.)	PEREZ'S OBJECTION TO
)	CONTINUANCE AND MOTION TO
)	SEVER CASE FOR TRIAL

Plaintiff, United States of America, by and through Joseph H. Harrington, Acting United States Attorney for the Eastern District of Washington, and Ian L. Garriques, Assistant United States Attorney, hereby responds to defendant Roman Berumen Perez' Objection to Continuance and Motion to Sever Case for Trial. (ECF No. 48). As set forth below, defendant's objection and motion should be denied because, among other things, he is jointly charged with his co-defendant in two of the four counts of the indictment, and his co-defendant needs additional time to prepare for trial.

APPLICABLE LAW

Joinder of charges against multiple defendants is controlled by Federal Rule of Criminal Procedure 8(b). *United States v. Sanchez-Lopez*, 879 F.2d 541 (9th Cir. 1989). The goal of Rule 8(b), which is to be construed liberally in favor of initial joinder, is to maximize trial convenience and efficiency with a minimum of prejudice. *United States v. Kenny*, 645 F.2d 1323, 1344 (9th Cir. 1981); *United States v. Roselli*, 432 F.2d 879,899

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(9th Cir. 1970). “Co-defendants jointly charged are, prima facie, to be jointly tried.” *United States v. Doe*, 655 F.2d 920, 926 (9th Cir. 1980). See *United States v. Hernandez*, 952 F.2d 1110, 1114 (9th Cir. 1991) (“Generally speaking, defendants jointly charged are to be jointly tried. This is also the rule in conspiracy cases.”); *United States v. Silla*, 555 F.2d 703, 707 (9th Cir. 1977) (“compelling circumstances” generally required to show necessity of separate trial); *United States v. Mariscal*, 939 F.2d 884, 885 (9th Cir. 1991).

Each defendant need not have participated in each act or transaction that contributed to the scheme. *United States v. Melton*, 689 F.2d 679, 684 (7th Cir. 1982); *United States v. Jones*, 425 F.2d 1048, 1057 (9th Cir. 1970). In *Roselli*, the Ninth Circuit stated:

[I]t is implicit in the language of Rule 8(b) that so long as all defendants participate in a series of acts or transactions constituting an offense or offenses, the offenses and defendants may be joined even though not all defendants participated in every act constituting each joined offense.

432 F.2d at 899. Here, defendants have been jointly charged with two counts of a four-count indictment, specifically, conspiracy to distribute 5 grams or more of actual methamphetamine (Count 1), and distribution of 5 grams or more of actual methamphetamine (Count 4). Co-defendant Rubio-Farias faces two additional charges for distribution of 5 grams or more of actual methamphetamine in July and August 2020. Because the defendants faces joint charges of conspiracy and distribution of controlled substances, they should be jointly tried pursuant to Rule 8(b).

The granting or denial of a motion for severance is governed by Federal Rule of Criminal Procedure 14, which provides:

If the joinder of offenses or defendants in an indictment ... appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants’ trials, or provide any other relief that justice requires.

Fed. R. Crim. P. 14. This rule is illuminated by well-established precedent, which has

consistently held that joint trials of persons charged with committing the same offenses are the rule rather than the exception and that there is a substantial public interest in the economy resulting from joint trials. *United States v. Brashier*, 548 F.2d 1315, 1324 (9th Cir. 1976); *Parker v. United States*, 404 F.2d 1193, 1196 (9th Cir. 1968).

The Supreme Court has held that severance should be granted “only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence. *Zafiro v. United States*, 506 U.S. 534, 539 (1993). Thus, in order to justify a severance under Rule 14, the defendant bears a heavy burden of demonstrating “clear, manifest, or undue prejudice.” *United States v. Sarkisian*, 197 F.3d 966, 978 (9th Cir. 1999); *see also United States v. Arbelaez*, 719 F.2d 1453, 1460 (9th Cir. 1983). The burden of showing prejudice is a difficult one and the ruling of the trial judge will rarely be disturbed on review. *United States v. Campanale*, 518 F.2d 352, 359 (9th Cir. 1975). The test is whether joinder is so manifestly prejudicial that it outweighs the dominant concern with judicial economy and compels the exercise of the court’s discretion to sever. *Brashier*, 548 F.2d at 1323. A mere showing of some prejudice is insufficient to require severance. Almost all joint trials involve some prospect of prejudice; however, such speculative prejudice is insufficient to require severance. As the Ninth Circuit stated in *United States v. McDonald*:

Some prejudice is necessarily inherent when defendants are joined for trial. However, ‘if all that was necessary to avoid a joint trial were a showing of prejudice, there would be few, if any, multiple defendant trials.’

576 F.2d 1350, 1355 (9th Cir. 1975). Rule 14 motions are committed to the sound discretion of the trial court. *United States v. Adams*, 581 F.2d 193, 197 (9th Cir. 1978); *United States v. Kennedy*, 564 F.2d 1329, 1334 (9th Cir. 1977). Therefore, a trial court’s denial of a motion to sever will be reversed only in those rare instances where the refusal amounts to an abuse of discretion. *Campanale*, 518 F.2d at 359; *Sitton*, 968 F.2d 947,

1 961 (9th Cir. 1992). Measures less drastic than severance, such as limiting instructions,
2 often suffice to cure any risk of prejudice. *Zafiro*, 506 U.S. at 539. Thus, a district court
3 should grant a severance only if a serious risk exists that a joint trial would compromise a
4 specific trial right of one of the defendants, or prevent the jury from making a reliable
5 judgment about guilt or innocence. *Id.* at 534, 538.

6 **ARGUMENT**

7 **A. Defendant's Motion to Sever Should be Denied Because He Fails to Show that** 8 **He Will Suffer Undue Prejudice if Tried Jointly with His Co-Defendant**

9 Defendant has failed to show that clear, manifest or undue prejudice will result
10 from a joint trial. Also, no compelling circumstances exist that would warrant separate
11 trials of the defendants. In his motion, defendant claims that a joint trial with the other
12 defendants would result in the jury finding him "guilty by association." However, such a
13 claim falls far short of what a defendant must show to obtain a severance under Rule 14.
14 *See United States v. Adams*, 581 F.2d 193, 198 (9th Cir.), *cert. denied*, 439 U.S. 1006
15 (1978).

16 Specifically, defendant claims that the jury would likely find him guilty due to his
17 mere association with his co-defendant, but not for the acts for which he is charged.
18 Defendant also claims that much of the evidence to be presented at trial will not pertain to
19 the charges against him. Nevertheless, such contentions fail to show that defendant will
20 face any clear, manifest or undue prejudice required before the Court may grant
21 severance. Here, defendant is jointly charged with his co-defendant in two of the four
22 counts of the indictment. The fact that his co-defendant is charged with two additional
23 drug distribution counts does not satisfy the high standard for granting severance under
24 Rule 14.

25 The Ninth Circuit has specifically held that severance should not be granted
26 without a showing of prejudice beyond that which necessarily inheres whenever multiple
27 defendants ... are jointly tried. *Adams*, 581 F.2d at 198. The possibility that defendant

1 might face better chances of acquittal at a trial separate from his co-defendant does not
2 warrant a severance. In addition, alleged “guilt by association” will be of little concern at
3 a joint trial, since the jury may be trusted to distinguish the evidence accordingly as to
4 each defendant. *See United States v. Reese*, 2 F.3d 870, 891 (9th Cir. 1993).

5 At the joint trial of defendants, the “jury can reasonably be expected to
6 compartmentalize the evidence as it relates to separate defendants.” *United States v.*
7 *Escalante*, 637 F.2d 1197, 1201 (9th Cir.), cert. denied, 449 U.S. 856 (1980). In
8 addition, appropriate jury instructions given by the Court will safeguard defendants’ trial
9 rights and ensure that no undue prejudice results. *See United States v. Nelson*, 137 F.3d
10 1094, 1108 (9th Cir.), cert. denied, 525 U.S. 901 (1998); *Adams*, 581 F.2d at 198.

11 Due to defendant’s failure to show compelling circumstances warranting a
12 severance, the strong interest in judicial economy dictates that all named defendants be
13 tried jointly. The preference for joint trials expedites the “administration of justice,
14 reduces the congestion of trial dockets, conserves judicial time, lessens the burden upon
15 citizens who must sacrifice both time and money to serve upon juries, and avoids the
16 necessity of recalling witnesses who would otherwise be called upon to testify only
17 once.” *Parker v. United States*, 404 F.2d 1193, 1196 (9th Cir. 1968), cert. denied, 394
18 U.S. 1004 (1969). Judicial economy is best served by single trials, not multiple ones.

19 Here, defendant has failed to meet the heavy burden of demonstrating “clear,
20 manifest, or undue prejudice” required by Rule 14 for severance. *Sarkisian*, 197 F.3d at
21 978. Thus, defendant’s motion should be denied.

22
23 **B. The Speedy Trial Act Allows Time to be Excluded for a Reasonable Period of
Delay Necessitated by a Co-Defendant’s Need to Prepare for Trial**

24 The Speedy Trial Act requires that a defendant’s trial commence within 70 days of
25 the later of the filing of an indictment or the defendant’s first appearance before the court
26 in which the charges are pending. 18 U.S.C. § 3161(c)(1). This rule, however, is

1 tempered by the Speedy Trial Act's exclusion of certain time periods from the 70-day
 2 calculation. *See* 18 U.S.C. § 3161(h); *United States v. Daychild*, 357 F.3d 1082, 1090
 3 (9th Cir. 2004) ("The Act recognizes, however, that legitimate needs of the government
 4 and of a criminal defendant may cause permissible delays.").

5 Section 3161(h)(6) applies in situations where certain defendants request a
 6 continuance, but other defendants joined for trial object. It provides that a court shall
 7 exclude a "reasonable" period of delay "when the defendant is joined for trial with a co-
 8 defendant as to whom the time for trial has not run and no motion for severance has been
 9 granted." 18 U.S.C. § 3161(h)(6); *United States v. Butz*, 982 F.2d 1378, 1381 (9th Cir.
 10 1993) ("Every circuit to consider [section 3161(h)(6)] has concluded that an exclusion to
 11 one defendant applies to all co-defendants."). Section 3161(h)(6) also supports the well-
 12 recognized rule that "[a]ll defendants who are joined for trial generally fall within the
 13 speedy trial computation of the latest codefendant." *Henderson v. United States*, 476
 14 U.S. 321, 323 n.2 (1986); *see also Daychild*, 357 F.3d at 1090 ("The speedy trial clock
 15 starts running after the indictment or arraignment (whichever comes last) of the last
 16 defendant.") (citation omitted).

17 The purpose of section 3161(h)(6) is to promote judicial efficiency through joint
 18 trials. *United States v. Salerno*, 108 F.3d 730, 737 (7th Cir. 1997). In *United States v.*
 19 *Varella*, 692 F.2d 1352 (11th Cir. 1982), the Eleventh Circuit summarized the history of
 20 section 3161(h)(6):¹

21 [Congress] felt that the efficiency and economy of joint trials far outweighed
 22 the desirability of granting a severance where the criterion was simply the
 23 passage of time Congress feared that rigid statutory time limits would

24
 25 ¹ *Varella* addressed a previous version of the Speedy Trial Act, in which the
 26 provision now codified as section 3161(h)(6) was section 3161(h)(7).

1 force courts to disregard the principle of “judicial efficiency”; courts would
2 be forced to grant severances unnecessarily in multi-defendant cases so that
3 a defendant whose case was moving slowly would not hold up the trial of his
4 co-defendants Thus, reasonable delay in multi-defendant cases was
5 specifically provided for by 18 U.S.C. § 3161(h)(7). Congress stressed that
6 the purpose of the provision is to make sure that [the Speedy Trial Act] does
7 not alter the present rules on severance of codefendants by forcing the
8 government to prosecute the first defendant separately or to be subject to a
9 speedy trial dismissal motion under section 3162.

7 692 F.2d at 1359 (quotations and citations omitted). The only limit imposed by section
8 3161(h)(6) is a reasonableness requirement. *United States v. Hall*, 181 F.3d 1057, 1062
9 (9th Cir. 1999).

10 Here, defendants were charged in a four-count indictment less than two months
11 ago on February 9, 2021. The government has since produced over 1,000 pages of
12 discovery. Counsel for co-defendant Rubio-Farias has requested additional time “to
13 properly investigate this matter in order to adequately defend Mr. Rubio-Farias” and “to
14 prepare and adequately represent [his] client.” Counsel has submitted adequate grounds
15 for continuing trial under the Speedy Trial Act based on the need for defense
16 investigation and effective preparation. Specifically, section 3161(h)(7)(A) of the Act
17 provides that a court must exclude periods of delay “resulting from a continuance granted
18 by any judge... on the basis of his findings that the ends of justice served by taking such
19 action outweigh the best interest of the public and the defendant in a speedy trial.” *Id.* In
20 order for such a period of delay to be properly excluded, “the court must state such
21 findings in the record, either orally or in writing.” *United States v. Medina*, 524 F.3d
22 974, 980 (9th Cir. 2008) (citations and internal quotation marks omitted); *see also* 18
23 U.S.C. § 3161(h)(7)(A).

24 To be sufficient, an “ends of justice” continuance must satisfy two requirements:
25 “(1) the continuance is ‘specifically limited in time’; and (2) it is ‘justified [on the record]”
26 with reference to the facts as of the time the delay is ordered.” *United States v. Clymer*,

1 25 F.3d 824, 828 (9th Cir. 1994) (citations omitted). The Court may exclude time under
2 the “interests of justice” exception under the factors set forth in 18 U.S.C. §§
3 3161(h)(7)(B)(i) - (iv).

4 Based on co-defendant Rubio-Farias’ need to prepare for trial, the Court should
5 grant his request for a continuance and set the matter for a joint trial of both defendants at
6 a reasonable future date.

7 **CONCLUSION**

8 Based on the foregoing, defendant Roman Berumen Perez’s objection and motion
9 to sever should be denied.

10 DATED: April 2, 2021

Respectfully submitted,

11 Joseph H. Harrington
12 Acting United States Attorney

13 By: /s Ian L. Garriques
14 Ian L. Garriques
Assistant U.S. Attorney

15
16
17 I hereby certify that on April 2, 2021, I electronically filed the foregoing with the
18 Clerk of the Court using the CM/ECF System which will send notification of such filing
19 to the following attorney of record in this case: Richard A. Smith.

20
21 /s Ian L. Garriques
22 Ian L. Garriques
Assistant U.S. Attorney